Supreme Court, U.S.
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No. 93-1617

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

THE VOLLRATH COMPANY,

Petitioner,

vs.

SAMMI CORPORATION,
KEN CARTER INDUSTRIES, INC., and
SAMMI (AMERICA) CORP.,

Respondents.

PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

ROBERT J. BAGDASARIAN*
THOMAS G. BAILEY, JR.
JOHN E. TARDERA
KELLY A. MOORE
WHITMAN BREED ABBOTT
& MORGAN
153 East 53rd Street
New York, New York 10022
(212) 888-0800

Counsel for Respondents

**Counsel of Record*

May 16, 1994

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Rule 29.1 Statement

Parent and Subsidiaries of the Respondents
(excluding wholly owned subsidiaries):

None

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Respondents Sammi Corporation ("Sammi"), Ken Carter Industries, Inc. ("Ken Carter"), and Sammi America Corporation ("Sammi America") (collectively "respondents") respectfully submit this brief in opposition to the petition for a writ of certiorari submitted by petitioner The Vollrath Company ("petitioner"). As described herein, certiorari should be denied in this case because:

1) The legal and factual premises assumed by the questions presented were not raised at the trial below and, thus, the Court of Appeals properly refused to consider such questions;

2) A reconsideration of the questions sought to be presented would be futile since both the Court of Appeals' decision and the District Court's findings are supported by other substantial evidence; and

3) The issues raised by the petition do not present special or important reasons for granting certiorari.

OPINIONS BELOW
JURISDICTION
STATUTORY PROVISIONS INVOLVED

Petitioner's brief accurately describes the opinions below, the jurisdictional grounds and that the statutory provisions involved are Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2.

STATEMENT OF THE CASE

Petitioner's Statement of the Case contains many of the same mischaracterizations and misstatements that the District Court has previously described as "an outright distortion" of the record. (Pet. at 46a, n. 36). Further, petitioner's Statement of the Case does not accurately describe the evidence or the theories that were presented to the jury and decided by the District Court. For an objective statement of the pertinent background to this case, respondents respectfully refer the Court to the factual statement recited by the District Court in its decision (Pet. at 19a to 24a) and by the Court of Appeals in its opinion (Pet. at 2a to 3a).

The only conspiracy theory that petitioner presented to the jury concerned unlawful acts allegedly undertaken solely by and between the three respondents, Sammi, Ken Carter, and Sammi America, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.[1] The primary purpose of the purported conspiracy

[1] At trial, petitioner also charged the same three defendants with conspiracy to monopolize under Section 2 of the Sherman Act, 15 U.S.C. § 2. That issue has not been pursued in the petition filed with this Court.

was to restrain trade in markets described as stainless steel mixing bowls[2] and stainless steel steamers ("steamers") imported into the United States primarily from Korea. Contrary to representations it now makes to this Court, petitioner *did not present evidence or argue* either that Sammi engaged in a conspiracy with non-defendant trade association members in Korea to restrain trade in a steamers market, or that the result of its actions in Korea amounted to a *per se* output restriction which reduced exports into the United States.

Petitioner's conspiracy theory below was quite simple. It was undisputed that Sammi America was a wholly owned subsidiary of Sammi and that on November 6, 1981, Sammi America acquired all of the stock of Ken Carter. (*See* joint pre-trial order, filed November 21, 1988, District Court Docket No. (hereinafter "Court Record") 135 at 2-4). Because the alleged conspirators were all commonly owned after the Ken Carter acquisition had been completed, petitioner argued to the jury that a conspiracy to restrain trade among the three respondents had been conceived and implemented before November 6, 1981, that is, prior to the time when, as a matter of antitrust law, the three respondents became parts of a single economic enterprise.[3] Indeed, petitioner's counsel admitted in his closing argument that in order to prevail on the Section 1 claim "the combination has to have predated the acquisition." (R.T. April 3 at 40). Because the conspiracy theory at trial involved only the three respondents as potential conspirators, the instructions to the jury similarly advised the jury that "any conspiracy must have commenced prior to the date when the defendants all became connected by common ownership." (R.T., April 4, 1989 at 29).

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[2] Petitioner similarly has not appealed from those portions of the decisions of the courts below denying its claims of restraint of trade and monopolization in the market for mixing bowls.

[3] The courts below held and petitioner does not here contest that the application of the intra-enterprise conspiracy doctrine set forth in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), prevented the finding of any unlawful conspiracy among members of the same economic enterprise after the date on which Ken Carter was acquired.

On appeal, petitioner changed its Section 1 conspiracy theory (i) by claiming that Sammi conspired with non-defendants, Dae Sung, Daelim and other members of the Korean Holloware Association, and (ii) by altering the nature of the offense from private predation intended to drive out Sammi's rivals in the United States to some concerted Korean effort to control output and prices of steamers. The Court of Appeals properly rejected this attempt to argue a theory not presented to the jury.*

The issue of alleged disruption or blockage of supplies of steamers was raised by petitioner at trial not in the guise of a Section 1 claim, but rather in the form of evidence intended to prove that the three respondents attempted to monopolize the United States market for steamers in violation of Section 2 of the Sherman Act. Both the District Court (Pet. at 44a to 47a) and the Court of Appeals (Pet. at 13a to 14a) held that on the evidence presented, no reasonable jury could have found that any of the respondents had attempted to monopolize steamers. In its decision granting judgment notwithstanding the verdict ("jnov"), the District Court found that petitioner had failed to prove any restraint of trade under its Section 2 theories, holding that "[t]here is no harm to distributors or to competition in the United States from the temporary steamer blockage .... On the state of this record, the harm to American consumers of steamers or the distributors selling those steamers is impossible to discern." (Pet. at 47a).

Finally, in its Statement (Pet. at 4), petitioner makes the same misleading assertions – that "[t]he stated goals" of the Korean

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* The Court of Appeals held that:

> "Vollrath's claim of conspiracy in the district court was based solely on an alleged conspiracy among Ken Carter, Sammi, and Sammi America and was submitted to the jury on that basis. On appeal, Vollrath seeks to expand the number of alleged conspirators to non-defendants, Dae Sung and the Korean Holloware Association. Here again, we decline to consider this expanded allegation of a conspiracy when asserted for the first time on appeal." (citation omitted).

(Pet. at 15a).

Holloware Association "include avoiding 'overcompetition' on price" and that the "express purpose" of the Korean Holloware Association was to "stop price competition",[5] – which the District Court dismissed as "an outright distortion" of the record. (Pet. at 46a, n. 36).

REASONS WHY THE PETITION SHOULD BE DENIED

I. *The Questions Presented Cannot Be Derived From The Record Below*

Petitioner's first question presented is founded upon two premises which are not sustainable on the record below. First, the jury did not find, as petitioner asserts, that "an arrangement among Korean exporters to divide and allocate products to be exported to the United States violated Section 1 of the Sherman Act." The issues of whether there was an "arrangement among Korean exporters" or whether the purpose of such arrangement was "to divide and allocate products to be exported" were simply not presented to the jury at all and petitioner cannot substantiate its mischaracterization of what the jury determined.

An additional flawed premise assumed in petitioner's initial question is that the jnov holding was somehow erroneously based on the established legal principle that "American antitrust laws do not regulate the competitive conditions of other nations' economies." The quotation is taken from *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 US, 574, 582 (1986) and obviously represents a correct statement of the law. The District Court did include those words from *Matsushita* in a footnote, but the text preceding the footnote as well as the entire text of the footnote make it clear that the District Court's actual holding was based on petitioner's failure to establish that the acts complained of *had any effect whatsoever on competition or*

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[5] Petitioner cites to the testimony of Mr. K.H. Park of Sammi who, contrary to petitioner's characterization, testified that the Korean Holloware Association does not seek to prevent price competition, but instead attempts to assure that its members comply with the antidumping laws of the United States. (R.T. Vol. 11 at 180-83).

markets in the United States, rather than its unwillingness to analyze the actions of foreign corporations in their home country.[6]

Petitioner's second question presented to this Court is totally dependent on its view that, even if the precise Sherman Act Section 1 claims first espoused on appeal were not properly presented below, the "gist" of petitioner's claims should have been "obvious from the outset." The "gist" of the conspiracy theory that *was* presented below was that three commonly owned private corporations sought to exclude competition by predatory means which would allow them to monopolize certain markets. On appeal, petitioner tried unsuccessfully to change both the cast of conspirators and the object of the conspiracy. The "gist" of the new expanded conspiracy theory was that one respondent entered into an unlawful arrangement

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[6] The District Court found that:

> "Having failed to prove that Sammi acted to intentionally abuse the rights granted by the Association, plaintiff claims that the operation of the Korean Metal Flatware Association itself violated the antitrust laws. . . . There is absolutely no evidentiary support in the record for this factual theory. Even if plaintiff's accusation were true, however, Vollrath could not make an antitrust violation out of that one fact alone. There is no proof of harm to distributors or to competition in the United States from the temporary steamer blockage. . . . On this state of the record, the harm to American consumers of steamers or the distributors selling those steamers is impossible to discern.[FN]
>
> FN: *If* Sammi did have monopoly power over steel production and used that power to prevent Daelim from entering the market to produce stainless steel steamers, that conduct would certainly be anticompetitive in Korea. However, the 'American antitrust laws do not regulate the competitive conditions of other nations' economies,' *Matsushita*, 475 U.S. at 582. Thus, plaintiff would be required to prove how the harm to Daelim affected competition in the United States."

(Pet. at 47a. and n. 38) (emphasis supplied).

with numerous other members of a trade association to reduce exports to the U.S., not as argued in the District Court for the purpose of excluding competitors, but so that prices could be raised and presumably shared by all.

Respondents respectfully submit that even if "obviousness" were the appropriate test to determine whether petitioner's new claims should have been considered below, the "gist" of the new theory is so unlike the "gist" of the theory actually tried that petitioner would fail its own test.

II. *The Court of Appeals Properly Refused to Consider The New Theories of Conspiracy*

The record below shows that the steamer disruption issue was presented by petitioner only in the context of a claim against respondents for attempted monopolization and that the conspiracy theories in the District Court never included anyone other than respondents. (*See, e.g.*, petitioner's post-trial memo at 45-53, Court Record No. 224). While petitioner attempts to pick shreds of evidence from the transcripts of a 17 day trial that mention newly alleged non-defendant co-conspirators, Dae Sung, Daelim and other members of the Korean Holloware Association, petitioner fails to make a showing that the theory of antitrust liability it now asserts was ever described to the jury or to the trial judge. The trial record including, *inter alia*, petitioner's argument to the jury, the joint pre-trial order, post trial motions and the instructions to the jury, in fact, show otherwise.

Accordingly, the Court of Appeals properly exercised its discretion in declining to review petitioner's newly invented theory of a *per se* output restriction of steamers involving non-defendant co-conspirators. *See Kline v. Johns-Manville*, 745 F.2d 1217, 1221 (9th Cir. 1984). The Court of Appeals' determination below is entirely consistent with the holdings of other courts of appeals. *See, e.g., Wakefield v. Church of Scientology of California*, 938 F.2d 1226, 1229 n.1 (11th Cir. 1991) ("Parties may make alternative claims, may change claims, may sometimes file inconsistent claims, but parties may not do so in the appellate court.");

Grasnick v. Otis Elevator Co., 817 F.2d 88, 89 (10th Cir. 1987) (*quoting United States. v. Lattauzio*, 748 F.2d 559, 561 (10th Cir. 1984)) ("[A] party generally cannot lose in a trial court on one theory and thereafter prevail on appeal on a different theory.").

The above cited decisions of the courts of appeals are also consistent with the rule established by this Court that a federal court generally "does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). Moreover, "[t]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Singleton v. Wulff*, 428 U.S. at 121.

Petitioner relies on this Court's decision in *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 142 (1968), claiming that "the gist" of its current conspiracy theory was made clear in the District Court (Pet. at 16), and that the District Court ruled on it (Pet. at 17). The record does not support petitioner's argument; and its reliance upon the *Perma Life* decision is misplaced. In *Perma Life*, the petitioners were franchisees who originally claimed that the franchisor and its subsidiaries conspired to restrain trade by forcing the franchisees to sign unlawful agreements. The petitioners apparently raised new theories of conspiracy on appeal, charging that the unlawful combination had occurred between themselves and the franchisor. The new theory of conspiracy concerned the same facts, the same agreements, the same product markets, and the same actors, albeit in different combinations. That situation is markedly different from the attempt by petitioner here to allege a completely new theory of conspiracy that involves a greatly expanded group of participants who allegedly conspired at a different time in a different country to fulfill different objectives. When properly applied to the facts of this case, the *Perma Life* decision would preclude consideration of the argument now propounded by petitioner.

III. *Consideration of Petitioner's Questions Would Not Change The Result Below*

Assuming *arguendo* that petitioner had sufficiently asserted the "gist" of its "naked output restriction cartel" theory at trial, which it did not, the factual findings in the courts below would preclude liability.

The gravaman of a "naked output restriction" is a clear horizontal agreement to place an artificial ceiling or limit on the quantity of products made available to the public. *See N.C.A.A. v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984). A decrease in the quantity of available products is inevitably accompanied by an agreement to set an artificially high price for the products. *N.C.A.A.*, 468 U.S. at 96-100.

The record in this case is barren of any evidence of any agreement, horizontal or otherwise, between Sammi and anyone else to restrict the output of steamers to the United States. Petitioner did not produce any evidence at trial either that the overall production of steamers manufactured in Korea or that the quantity of steamers exported to and sold to the United States was reduced or suppressed at any time. To the contrary, the only evidence adduced at trial regarding the U.S. market for steamers during the relevant period was that there were numerous importers and wholesalers of steamers, including petitioner Vollrath, Metro Industries, the Leyse Company (Ex. 851), National Silver (Ex. 350), Progressive, Trend Company, Daeware and the respondents. (R.T. Vol. 4-B at 21, 28-30, 128; R.T. Vol. 6 at 19-20). The only restriction proven at trial was that two of the importers experienced brief delays in obtaining steamers from the factory of their choice. (Pet. at 24a and n.13, 47a).

Further, no evidence was introduced that the price of stainless steel steamers in the United States was artificially high, as would be expected in an output restriction case. In fact, petitioner tried to prove the opposite, that respondents were selling steamers below cost as part of a predatory scheme to drive competitors from the marketplace. (R.T. Vol. 3 at 49-54; R.T. Vol. 5 at 180-81).

Based on the evidence introduced at the trial, the District Court justifiably concluded that no harm to competition in the United States had been shown:

> The record is also silent with respect to proof of any of the requisite elements of an antitrust case on any theory in relation to the steamer blockage. The Court can only assume that the steamer incident was introduced as a makeweight to bolster the intent element of the predatory pricing claim.

(Pet. at 58a).

Because petitioner failed to show an effect on commerce in the United States market for steamers, its claims would be doomed even had its new expanded Section 1 conspiracy theory been applied. Notwithstanding petitioner's contentions here, foreign activities which have no impact in the United States are beyond the reach of the Sherman Act. *See, e.g., Hartford Fire Insurance Co. v. State of California*, 113 S. Ct. 2891, 2909 (1993) where this Court stated that "the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." (citing *Matsushita*, 475 U.S. at 582, n.6 (1986) and *United States v. Aluminum Co. of America*, 148 F.2d 416, 444 (2d Cir. 1945)).

Thus, even if the petitioner had presented below the "gist" of a conspiracy theory involving numerous non-defendant co-conspirators who sought to impose steamer output restrictions, the findings below of no market impact would preclude the possibility of success of such a claim.

IV. *The Granting of Certiorari Is Not Justified On Policy Grounds*

A. *Summary Reconsideration Is Not Warranted.*

Respondents respectfully submit that the summary reconsideration order suggested by petitioner is totally unwarranted.

Such orders are generally only entered so that the lower court may review its ruling in light of an intervening event, usually an intervening Supreme Court ruling or a new statute. *See, e.g., Eckerd Drugs, Inc. v. Brown*, 457 U.S. 1128 (1982) (new decision); *Bureau of Economic Analysis v. Long*, 454 U.S. 934 (1981) (new statute). Petitioner has not referred to any intervening event that requires the Court of Appeals to reconsider its decision because, indeed, the only material intervening changes in the law since the entry of the jnov decision are two very recent antitrust decisions of this Court that resoundingly endorse the decisions of the lower courts on the issues of predation, attempted monopolization, and the proper application of jnov decisions in the context of "runaway" jury verdicts. (Pet. at 9a, Court of Appeals' decision citing *Brook Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578 (1993); *Spectrum Sports, Inc. v. McQuillan*, 113 S.Ct. 884 (1993)).

B. *This Case Does Not Present Special Or Important Reasons For the Granting of Certiorari*

This Court will grant certiorari "only when there are special and important reasons therefor." Rule 10.1. This case, and the issues raised by the petition, do not present any such reasons and cannot be expected to be of material consequence other than to the parties involved.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

ROBERT J. BAGDASARIAN*
THOMAS G. BAILEY, JR.
JOHN E. TARDERA
KELLY A. MOORE
WHITMAN BREED ABBOTT
& MORGAN
153 East 53rd Street
New York, New York 10022
(212) 888-0800

Counsel for Respondents

Dated: May 16, 1994

**Counsel of Record*